IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

	No. 5:13-CV-00172-F-1
BARTOLO GONZALEZ, Petitioner,)
v.	ORDER
UNITED STATES OF AMERICA, Respondent.))

This matter is before the court on Bartolo Gonzalez's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE-80]. In Gonzalez's section 2255 motion, he argues that neither of his attorneys filed a notice of appeal as he requested. [DE-80 at 12.] Gonzalez further argues that his counsel refused to file a notice of appeal, even though he requested that one be filed. [DE-95 at 9.]

In the Memorandum filed in support of the Government's Motion to Dismiss or Motion for Summary Judgment, the Government argues that Gonzalez's claim fails based on the sworn statements from Gonzalez's lead attorney, Robert Ramos, and his local attorney, William Peregoy. [DE-89 at 5.] In Ramos' affidavit, he states that Gonzalez did not request or direct him to file a notice of appeal. [DE-89, Exhibit A at 2.] In Peregoy's affidavit, he states that Gonzalez never conveyed to him that he wished to appeal his sentence. [DE-89, Exhibit B at 1.]

Rule 8 of the Rules Governing Section 2255 Proceedings provides that it is within the discretion of the district court to determine whether an evidentiary hearing is warranted. The court may decide a § 2255 motion without an evidentiary hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §

2255(b).

In this case, the court finds that a credibility issue exists and the Government has not conclusively shown that Gonzalez is not entitled to relief on his section 2255 motion. For these reasons, the court concludes that an evidentiary hearing is necessary. Accordingly, the Clerk is DIRECTED to schedule an evidentiary hearing in this case.

Pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings, when an evidentiary hearing is warranted, the court must appoint an attorney to represent a moving party who qualifies to have appointed counsel under 18 U.S.C. § 3006A. Although Gonzalez had retained counsel when he was previously before this court, it is not clear whether Gonzalez presently qualifies for appointed counsel. Therefore, the Clerk is DIRECTED to mail Gonzalez a financial affidavit so that it can be determined if he qualifies for appointed counsel.

SO ORDERED.

This _____ day of October, 2014.

JAMES C. FOX

SENÍØR UNITED STATES DISTRICT JUDGE